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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-205602

DATE: July 7, 1982

MATTER OF: R. H. Ritchey

DIGEST:

1. Although would-be protester must exercise due diligence in ascertaining grounds of protest, where protester has no knowledge of possible basis of protest until it receives a debriefing which agency delayed until nine months after protested awards, protester cannot be faulted for not filing protest prior to debriefing.
2. Where agency promises debriefing but is delayed in providing it, protester is not required to file Freedom of Information Act request to obtain information agency is required to provide in the promised debriefing.
3. Where protester submits proposals to perform work in each of seven geographical regions and proposes to use its personnel from two regions to perform work in third region, agency determination that such proposed use renders all but two proposals unacceptable because of concern regarding personnel availability is properly viewed as element of proposal evaluation rather than as a nonresponsibility determination requiring referral to Small Business Administration.
4. Where agency determination that proposals are unacceptable because proposed personnel may not be available is reasonable and consistent with evaluation criteria, it is not subject to legal objection.

R.H. Ritchey protests the Environmental Protection Agency's refusal to award it at least three contracts for audit services under request for proposals (RFP) No. WA 80-C213. Ritchey, who was awarded two of nine contracts covering nine geographical regions, contends that its proposals for at least two more of the contracts were lowest in price and highest in technical quality and that it should have been awarded at least one additional contract. For the reasons discussed below, we deny the protest.

Ritchey submitted proposals covering seven of the nine regions. All seven of Ritchey's proposals were within the competitive range, lowest in price in five, and highest in technical quality in three. However, EPA, in a letter of October 1980 informed the Small Business Administration (SBA) that it had found Ritchey to be nonresponsible because of a lack of business integrity. This finding was based on the fact that the managing partner of Opalack and Company, which was the predecessor to R.H. Ritchey, had been convicted of false pretenses in connection with a previous contract with the Department of Labor (DOL). EPA pointed out that DOL had commenced debarment proceedings against the former partner and Messrs. Ritchey and Cotton, the two remaining partners, and that, although the firm had reorganized and changed its name to R.H. Ritchey, the former partner continued to serve as a consultant to the firm. Therefore, EPA expressed the belief that the firm lacked integrity. The SBA, however, on November 21, 1980, issued a Certificate of Competency (COC), valid for 60 days, finding the firm to be "responsible to perform the proposed procurement covered by the referenced solicitation."

Meanwhile, EPA had asked Ritchey to clarify its proposed staffing by submitting with its best and final offer the names of all proposed audit team members. During December 1980, EPA determined that while Ritchey proposed three audit teams, the third team consisted entirely of members of the first two teams. EPA concluded that Ritchey would be acceptable for performing a maximum of two contracts because the regions could place their orders for audit services simultaneously.

On December 22, 1980, DOL's Board of Contract Appeals ordered that Opalack and Company and Messrs. Opalack, Ritchey, Cotton and LiPera be debarred from participating in contracting or subcontracting with DOL for one year from that date. EPA then made awards in January and February to

other companies for seven of the nine regions and notified Ritchey of the award prices. It withheld award to Ritchey on the other two contracts pending a decision on whether EPA would initiate debarment proceedings. When Ritchey made a request on February 16, 1981 for a debriefing as to the other regions, it was advised the debriefing would be delayed until awards for the two remaining regions had been made.

Because the initial COC had expired, EPA wrote to SBA on April 1, 1981 for a review of the COC matter, stating that in the interim period Ritchey had been debarred by DOL and that EPA was considering the debarment of Ritchey. It again expressed the belief that the facts warranted a determination of nonresponsibility because of a lack of business integrity, but SBA revalidated the COC on May 18, 1981. SBA attached a copy of its analysis in which the first COC was referred to as a "COC (integrity)" and stated the basic issue to be the integrity of Ritchey, which it resolved favorably to Ritchey. SBA noted that where a firm has been debarred by one agency, Federal Procurement Regulations (FPR) § 1-1.604 authorizes another agency to impose a similar debarment on the same firm, but that EPA had not attempted such an action. It further noted the DOL decision found that none of the errors and omissions of Ritchey was of sufficient magnitude to warrant an inference of willful misconduct.

Awards of the two remaining contracts were made to Ritchey on July 6, 1981 and July 28, 1981, and by letter of August 5, 1981, Ritchey renewed its request for a debriefing as to why it had not received award on any of the others. EPA states that due to workload constraints, it could not conduct the debriefing until November 18, 1981. Ritchey's protest was received by our Office on November 25, 1981.

EPA now contends that Ritchey did not diligently pursue its protest before the debriefing through a request for information under the Freedom of Information Act, 5 U.S.C. § 552 et seq. (1976), which would have revealed its grounds for protest and that the debriefing told it nothing not previously available. EPA asserts that the protest is therefore untimely under our Bid Protest Procedures, 4 C.F.R. § 21.2(b) (2) (1981), which requires that a protest be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier.

Ritchey contends that it had no basis for protest prior to the debriefing because it was only then that it was told that it was not awarded more than two contracts because the EPA did not want "all of its eggs in one basket." It concedes that it knew the other five contracts were awarded at prices higher than it offered but contends that since the RFP provided that price would be secondary to technical quality in the evaluation, it assumed the technical proposals of the awardees were rated better than its proposals.

Generally, we expect a would-be protester to exercise due diligence in ascertaining possible grounds for protest. See, e.g., National Council of Senior Citizens, Inc., B-196723, February 1, 1980, 80-1 CPD 87. Under the circumstances, however, we do not believe we would be justified in viewing this protest as untimely. Ritchey had no knowledge of a basis for protest until it received the debriefing. Also, since Ritchey was being considered for awards of the remaining two regions, we can understand its reluctance to file a protest during the time EPA had the awards under consideration, and note that it promptly renewed its request for a debriefing when it received the two awards. Moreover, since Ritchey was entitled to a meaningful debriefing under EPA's own regulation, see 41 C.F.R. § 15-3.103 (1981), we do not believe it was incumbent on Ritchey to file a Freedom of Information Act request in lieu of the promised debriefing. Accordingly, we will consider the protest on the merits.

Ritchey disputes EPA's determination that it could not perform more than two of the contracts. It further suggests that the determination actually reflects EPA's decision that Ritchey did not have the capacity to perform a third contract, and that such a decision involves Ritchey's responsibility as a prospective contractor and therefore should have been referred to the Small Business Administration (SBA).

Under the provisions of the Small Business Act, 15 U.S.C. 637(b)(7) (Supp. I 1977), no small business concern may be denied an award because of nonresponsibility without referral by the agency to SBA for a final disposition. We have recognized, however, that some matters which usually bear on responsibility may be considered as part of a technical evaluation when negotiation procedures are used and, if the offeror is found to be deficient for technical reasons, the matter need not be referred to SBA. Utah Geophysical Inc., B-201095, November 18, 1980, 80-2 CPD 377; SBD Computer Services Corporation, B-186950, December 21, 1976, 76-2 CPD 511.

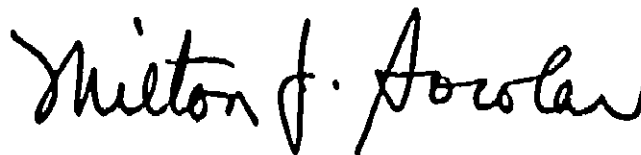
Ritchey argues that in the Utah and SBD Computer cases, the protester's proposals were judged to be technically unacceptable and were not placed within the competitive range, while here each of Ritchey's "virtually identical" proposals was placed in the competitive range. Thus, Ritchey contends, it is impossible to conclude that its nearly identical proposals were technically acceptable for two contracts and technically unacceptable for some of the others.

What Ritchey overlooks is that its proposals, while individually acceptable initially, all could not result in an award in light of the agency's view regarding the personnel makeup of the proposed audit teams. That is why EPA, after evaluating the initial proposals, requested Ritchey to clarify its proposed staffing when submitting its best and final offers. The technical evaluation panel then determined, in light of the proposed staffing, that Ritchey's proposals were acceptable with respect to any two regions but not for more than two. In other words, two of Ritchey's proposals remained acceptable after best and finals, while its others were no longer acceptable because of what was viewed as an inadequate proposed staffing approach. We believe this clearly was an appropriate matter for EPA's technical evaluation process and was not simply a responsibility determination requiring referral to SBA. See, e.g., SBD Computer Services Corporation, B-186950, December 21, 1976, 76-2 CPD 511.

With respect to the determination itself, we find no basis for legally objecting to EPA's judgment. As we have often stated, it is not our function to independently evaluate proposals. Rather, we consider only whether the agency's evaluation is reasonable and consistent with the evaluation criteria established for the procurement. See, e.g., Grey Advertising, Inc., 55 Comp. Gen. 1111 (1976), 76-1 CPD 325. On this record, it appears to us that the agency's concern about the availability of the audit teams was a valid one and that the evaluation reflecting that concern had a reasonable basis. Moreover, while the solicitation did not explicitly state that different audit teams had to be proposed for each region, the RFP did provide for evaluation of "Project Management,"

including adequacy of audit teams, staffing, and organization, and we believe that EPA clearly could consider availability of audit teams as a legitimate aspect of the overall technical evaluation.

The protest is denied.

A handwritten signature in cursive script, reading "Milton J. Aorolan".

Acting Comptroller General
of the United States